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September 24, 2001

VIA FACSIMILE AND  
FEDERAL EXPRESS

Xavier McDonnell  
Office of General Counsel  
Federal Election Commission  
999 E Street, NW  
Washington, DC 20463

Re: MUR 4919

Dear Mr. McDonnell:

The enclosed brief will serve as our reply on behalf of Charles Ball for Congress, Justin Briggs, treasurer, to the findings and recommendations contained in the General Counsel's probable cause brief, which we received September 10, 2001. As requested, we have included three copies for the General Counsel's office; ten copies of the brief and this letter are also being sent to the Commission's Secretary, Mary W. Dove.

To summarize, the General Counsel's brief recommends that the Commission find probable cause to believe that the Charles Ball for Congress Committee knowingly and willfully violated sections 441h and 441d(a), and that Justin Briggs as Treasurer also knowingly and willfully violated these two provisions. Our brief contends that the argument in Counsel's brief is deficient to demonstrate liability on behalf of the Committee and of Justin Briggs, its Treasurer.

Our goal from the beginning has been to see this matter resolved as expeditiously and fairly as possible. As you know, the Committee has twice requested preprobable cause conciliation with the Commission.

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FEDERAL ELECTION  
COMMISSION  
OFFICE OF GENERAL  
COUNSEL  
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Letter to Mr. McDonnell

September 24, 2001


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The enclosed brief identifies several deficiencies with your case against the Committee and Mr. Briggs, which we believe should lead the Commission to find no probable cause to believe that the Committee violated section 441d(a) with respect to the telephonic communications, or section 441h; or that Mr. Briggs violated either section 441d(a) or section 441h.

Should the General Counsel nevertheless be able to persuade the Commission that the Committee and its Treasurer are liable, we would like to call to the Commission's attention Respondents' cooperation in this matter. The Committee and Mr. Briggs have endeavored to provide complete and accurate responses to your requests, including providing for your lengthy examination two computers used in the campaign (one of which had passed through two subsequent owners and was a challenge to locate). Both Justin Briggs and the candidate, Charles Ball, have answered your questions, and Charles Ball also submitted to a deposition under oath. We trust that the Commission will view this cooperation as a mitigating factor in its consideration of this matter.

Thank you for your consideration of our Reply Brief in MUR 4919.

Very truly yours,



Allison R. Hayward

ARH:ljc

**BEFORE THE FEDERAL ELECTION COMMISSION**

In the Matter of )  
Charles Ball for Congress ) MUR 4919  
Justin Briggs, Treasurer )

**REPLY BRIEF ON BEHALF OF CHARLES BALL FOR CONGRESS,  
JUSTIN BRIGGS, TREASURER**

MUR 4919 involves a mailing and a phone bank allegedly procured by agents of the Charles Ball for Congress campaign in the final days of the 1998 general election. The mailing was styled to be from "George Miller" on behalf of the "East Bay Democratic Committee." The phone bank script apparently represented that phone calls were for the "East Bay Democrat Committee." The General Counsel's Brief recommends that the Commission find probable cause to believe that both the Charles Ball for Congress Committee and Justin Briggs, as the Committee's treasurer, knowingly and willfully violated 2 U.S.C. § 441d(a) by financing a communication lacking proper disclaimers, and knowingly and willfully violated 2 U.S.C. § 441h, which prohibits certain fraudulent misrepresentations by candidates and their employees or agents.

**I. FACTS**

The General Counsel's brief sets forth a complex series of factual findings to demonstrate that the Charles Ball for Congress Committee ("Committee") funded this mailing and a phone bank through which voters were encouraged not to support Ellen Tauscher, Ball's opponent. The Committee has no independent information by which it can augment or refute these facts, or challenge the assumptions made by the Counsel's office as to the size of the mailing and phone bank or how the communications were funded.

**II. LEGAL ANALYSIS**

**A. Analysis of section 441d(a) allegation against Committee**

The Committee concedes that it was a "person" that violated section 441d(a) by financing the mailer without a proper disclaimer, since it has no basis to contest the Counsel's conclusion that a campaign employee procured the mailing or that the mailing meets the requirements of a "direct mailing" as defined in 11 C.F.R. § 110.11(a)(3) subject to the disclaimer requirements set forth in 11 C.F.R. § 110.11(a).

However, the General Counsel's brief appears to conflate the mailing and the phone bank in its section 441d(a) argument, by referring to the Committee's failure to provide disclaimers to the "communications" at issue in this MUR. The Committee reminds the General Counsel that phone bank communications are *not* general public political advertising requiring a disclaimer. See 2 U.S.C. § 441d(a), 11 C.F.R. § 110.11(a)(1); FEC Advisory Opinion 1988-1. Accordingly, the section 441d(a) violation should be limited to the mailings in this MUR.

B. Analysis of section 441h allegation against Committee.

The General Counsel's brief also alleges that the Committee violated 2 U.S.C. § 441h. The Committee does not believe it is a proper Respondent to an action under section 441h. That statute reads in pertinent part:

No person who is a candidate for federal office or an employee or agent of such a candidate shall — (1) fraudulently misrepresent himself or any committee or organization under his control as speaking or writing or otherwise acting for or on behalf of any other candidate or political party or employee or agent thereof . . . (2) willfully and knowingly participate in or conspire to participate in any plan, scheme, or design to violate paragraph (1).

The terms "person" and "candidate" are defined in the Act. 2 U.S.C. §§ 431(2) & 431(11). "Person" can include a committee or any other organization, but to be liable under section 441h that "person" must *also* be a candidate (a definition limited to *individuals*) or an agent or employee of a "candidate".

Under these facts the Committee cannot understand how it can be the "candidate" or "agent" or "employee" of a candidate as required for liability under section 441h. The General Counsel's brief does not explain under what authority it may assert liability against the Committee when the Act so specifically delineates who can be found liable. (The Counsel's brief instead seems to concede this point, stating that "[s]ection 441h thus imposes liability on *employees or agents* of the candidate." General Counsel's Brief, MUR 4919 at 6.) The case against the Committee apparently rests entirely on an imputed liability theory by which the alleged conduct of an agent of the campaign is automatically extended to the Committee. Such indirect liability does not appear to be accommodated by the plain words of section 441h. The Committee thus contends that the General Counsel's brief fails to state a case against the Committee for a violation of section 441h.

Section 441h also requires a finding of "fraudulent misrepresentation" by the violator. The elements necessary to prove fraud are (a) misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of falsity (or "scienter");

(c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and (e) resulting damage. See *Lazar v. Superior Court* 12 Cal.4th 631, 638 (Cal. 1996); *Molko v. Holy Spirit Assn.* 46 Cal.3d 1092, 1108 (Cal. 1988). The Counsel's brief does not show how the Committee has committed fraud, or how it could be susceptible to liability for the alleged fraud of another.

### C. Analysis of allegations against Justin Briggs

As for Justin Briggs, the Committee's treasurer, there is no evidence that he was involved in the conduct at issue in this MUR in any way. As you know, Mr. Briggs was not the Committee's Treasurer at the time of the events at issue. Nor did Mr. Briggs have any knowledge of or involvement with the mailing or the phone bank. The Committee and Mr. Briggs believe that it is inappropriate to find Mr. Briggs separately in violation of *any* provision of the Act, especially a "knowing and willful" violation of the Act.

### D. Constitutionality of section 441h

Finally, the Committee believes that section 441h may pose an unconstitutional burden on free speech and thus violates the First Amendment. There appear to be no cases that discuss the permissible scope of section 441h specifically. However, in other political speech contexts courts have held that laws which purport to enforce "truth" in political campaigns impose unacceptable burdens upon the rights of political speakers. Instead, the First Amendment operates to insure the public decides what is true and false. *Meyer v. Grant*, 486 U.S. 414, 419-20 (1988). To sustain our constitutional commitment to uninhibited political discourse, the government may not prevent others from "resort[ing] to exaggeration . . . and even to false statement." *Cantwell v. Connecticut*, 310 U.S. 296, 310 (1940) *quoted in State of Washington v. 119 Vote No! Committee*, 957 P.2d 691 (Wash. 1998).

The General Counsel cites the *Time Inc. v. Hill* case to support an argument that section 441h is constitutional. *Time Inc. v. Hill*, 385 U.S. 374 (1969), *cited in* General Counsel's Brief, MUR 4919 at 6. The *Time* case dealt with the commercial publication surrounding a family's hostage ordeal. It did not consider the regulation of political speech and would not seem to be properly invoked here. The Committee instead argues that, given the questionable constitutionality of section 441h, the Commission should not proceed with enforcement of the statute in this MUR.

## III. CONCLUSION

The Charles Ball for Congress Committee, and Justin Briggs as treasurer for the Committee, respectfully submit this Brief to demonstrate that the Commission should find no probable cause to believe that the Committee violated section 441d(a) with

respect to the phone bank activity at issue, and should find no probable cause to believe that the Committee violated section 441h. Moreover, the Commission should find no probable cause to believe that Justin Briggs, who is merely the present Treasurer of the committee, violated any provision of federal election law in this matter.